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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RAFAEL TORRES, Defendant and Appellant.	G033019 (Super. Ct. No. M9545) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James P. Marion, Judge. Affirmed.

Diana M. Teran, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Quisteen S. Shum and Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Rafael Torres appeals from an order committing him to a state hospital as a sexually violent predator (SVP), pursuant to the Sexually Violent Predators Act (SVPA), following a jury trial. (Welf. & Inst. Code § 6600 et seq.)[1]

Defendant contends two incidents of jury misconduct require reversal. We find that in one incident there was no substantial likelihood of juror bias even if jurors did tell each other they did not know what a particular term meant. As to the second incident, the defense waived any error by not making an objection when invited to do so by the court. Even if the court should have conducted further inquiry of the jury, from the totality of the circumstances, we find defendant suffered no harm as a result of the second incident.

Absent from the court's instruction was an admonition that the jury must determine whether custody in a secure facility was necessary to ensure that defendant was not a danger to the health and safety of others. Based on the evidence, we conclude there is no reasonable probability that the jury would have arrived at a result more favorable to defendant had the language at issue been included in the court's instructions.

Defendant's argument that the SVPA is unconstitutional because it does not require a separate finding of inability to control behavior was rejected by the California Supreme Court in *People v. Williams* (2003) 31 Cal.4th 757. Under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, we are required to follow precedent. We affirm.

I

FACTS

The trial commenced on October 7, 2003. The attorneys entered several written stipulations. Among them was the following: "The parties hereby stipulate for

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

the purposes of the jury trial that Respondent Rafael Torres, is the same Rafael Torres who suffered the following convictions: [¶] 1. On January 30, 1981, in Orange County Superior Court case number C46260, three counts of Penal Code Section 288(a) against three victims, Carlos D., Frank L. and Juan P[.] and was found to be a mentally disordered offender. [¶] 2. On May 28, 1991 in Orange County Superior Court case number C85220, eight counts of Penal Code section 288(a) against two victims, Oscar W. and John W[.] and was sentenced to 22 years in state prison."

Clinical forensic psychologist Hy Malinek said he has performed approximately 200 SVP evaluations. Malinek was asked to evaluate defendant "and see if he meets the criteria as a sexually violence [*sic*] predator."

Malinek described a sexually violent offense as "skin-to-skin contact between the offender and a child's genitals." He said his review of defendant's records revealed defendant had six "qualifying" convictions for lewd acts on a child. In the cases discussed before the jury, all of the victims were boys ranging in ages from eight to twelve.

During the evaluation process, Malinek asked defendant why he continued to offend after he received treatment. Defendant told him "the kids came to him, they jumped on him and he sort of gave in. Stated that he [*sic*] in 1990 he tried to get away from the same environment but still found himself going back exactly to the same place. There was a loss of explanation as to why this occurred again."

With regard to whether defendant is a predator, Malinek testified that "in all of the cases he either established or promoted relationships with children that he had known, neighborhood children, children he had coached, as in a Little League, in '70s for example, or neighborhood children. [¶] He cultivated relationships with them for the purpose of sexual misconduct. He did so by offering treats, by offering to — by giving them potato chips, by inviting them over, by taking them places, lured them in his presence for the purpose of sexual victimization."

Malinek's opinion is that defendant "suffers homosexual pedophilia." He said defendant also has a long-term character problem similar to avoidant personality disorder.

At the end of the first day of testimony, while the judge was admonishing the jury, he asked if there were any questions. An unidentified juror said, "We didn't understand the term R & R, when they were using that term." The court said, "We will talk about that tomorrow. If we can answer that we will." After the jury was excused, defense counsel stated, "They shouldn't be discussing the case, number one. Like they all discussed the R & R thing." The court and counsel then discussed that R & R refers to procedures for checking in and out of prison and means "reception and receiving." The judge said, "Remind me to tell them that tomorrow; okay?"

The next morning, October 9, 2003, while defense counsel requested a hearing outside the presence of the jury regarding another issue, neither counsel reminded the court to tell the jury anything. Nor did the court mention anything about R & R to the jury.

Later during the trial, Juror No. 4 wrote a letter to the judge: "Re: People vs. R. Torres, OC Sup.Ct. 39; October 2003: Capital issues [¶] Hon. James Marion: [¶] This jury member needs to know that in my decision there *may be* or *cannot be* significantly probable murder or mutilation (cruel and unusual). [¶] Defendant has witnessed for eleven years the incarceration of pedophiles (himself and others) with type-4 (hardened) criminals. [¶] Defendant has witnessed one prison murder of a pedophile and one mutilation of a pedophile (cruel and unusual). [¶] Expert witness corroborated danger to incarcerated pedophiles. [¶] If re-incarcerated, what assurances are there that defendant wouldn't be housed with hardened criminals. I don't believe the CPC mandates the segregation of pedophiles, but even if it did, that might not be enough in a Life matter. I don't know for a fact but I believe statutes prohibit prison overcrowding, yet prison overcrowding routinely persists. So, a general law alone is not the answer. It

seems that there needs to be a court involved stipulation about the segregated incarceration of *this* prisoner, R. Torres, that must be honored or he must be re-released back into society. [¶] Unfortunately there are murders in all societies even prison societies. But society and civilization work toward the elimination of all murders. Some jurors and some inmates think pedophiles must die. Via implied law, the State of California does not think pedophiles must die. Therefore incarcerating pedophiles with hardened criminals is 'cute' justice to some people, a kind of pedophile roulette. As disgusting as this pedophile is he didn't kill anyone; there's nothing poetic about it. [¶] Cute justice is acute injustice. And the more perfectly the courts mete out justice between the conflicted law and reality, the more perfectly the Legislature can, with future laws, force the hand of penal administrators to resolve the conflicts. [¶] Without assurances of segregated incarceration ***I believe the sixty-six year old R. Torres, a proven and psychotic pedophile, will never re-offend*** because of the strongest human urge of self-preservation against ignominious murder and/or cruel and unusual torture. With a more worthy penal system, I would vote differently. [¶] As a juror I will serve on this case with or without assurances of segregated incarceration. In my deliberation I wish to carryout the will of The People given the law, the facts of the case, and the reasoning of counselors. [¶] Respectfully, [¶] juror #4[.]"

The court conducted a chamber's conference with the attorneys and juror No. 4. The judge inquired whether Juror No. 4 "talked specifically with any of the jurors in this case?" Juror No. 4 answered, "No." The juror quickly added there had been conversations which included two other jurors: "The only thing that's been mentioned between jurors, 'This might be a quick case,' or like their mind is made up. That's all that was said." The judge asked, "— based on the fact that we had a few witnesses?" Juror No. 4 responded, "We weren't here Friday, so it would have been Thursday." The judge asked for clarification about whether or not anyone talked about the case itself, and the juror responded, "No, absolutely not." Later the judge inquired, "All right. So you

haven't expressed any of these views to any other jurors?" Juror No. 4 said, "Absolutely zero. Nothing."

The juror was excused from chambers and the judge said to counsel, "Okay. We're still on the record here. We did talk about this off the record, and the reason we called [Juror No. 4] in was just to find out whether or not he expressed any of these views in the letter to any of the other jurors. We made a decision, I think, a group decision not to get into the issues raised in the letter. Is that your indication?" Both counsel replied in the affirmative. The judge then asked, "Anything else about other jurors?" Both counsel said there was nothing else. They agreed to select another juror "in a lottery fashion." The judge inquired, "Anything else?" Both counsel answered, "No." The court excused Juror No. 4 from the jury.

At each break and at the end of every court day, the court instructed the jury not to talk about the case. On October 15, jurors were sent to deliberate. The next day, the jury returned with a finding: "that the Respondent Rafael Torres, is a sexually violent predator within the meaning of Welfare and Institutions Code section 6600."

Defendant raises three issues on appeal. He contends the trial court erred in failing to conduct a hearing into juror misconduct. He also claims error because the court failed to instruct the jury they must determine whether custody in a secure facility was necessary to ensure defendant was not a danger. His last claim of error is that the SVPA is unconstitutional "because it does not require a separate finding of inability to control behavior."

II

DISCUSSION

Juror misconduct

Defendant claims his right to a fair and impartial jury was violated. He contends the trial court erred in failing "to conduct a hearing into juror misconduct to see if good cause existed to discharge one or more jurors." According to defendant, the

jurors were discussing the case. His argument is based on two incidents. The first is the R & R question which was from one juror who said, "*We* didn't understand the term R & R, when they were using that term." (Italics added.) The second incident involved the letter from Juror No. 4.

Defendant cites *People v. Pierce* (1979) 24 Cal.3d 199, as a basis for his argument that the jurors misconducted themselves. In *Pierce*, the foreman went to the home of a neighbor police officer who had testified in the trial. The juror asked the officer to explain the fingerprint investigation conducted. The two discussed fingerprints, as well as photographs not admitted into evidence and the prosecutor's tactics. (*Id.* at pp. 205-206.)

In *Pierce*, the trial judge admonished the jury not to discuss the case at every break in the proceedings. The *Pierce* court found serious juror misconduct, stating, ". . . jury misconduct raises a presumption of prejudice; and unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial. [Citations.]" (*People v. Pierce*, *supra*, 24 Cal.3d at p. 207.)

As to the R & R question which included the word "we," it is not known whether the juror who used the word was presuming others did not understand or somehow knew other jurors were unfamiliar with the term. Assuming there was some communication about what the term meant, it is not known if such communication consisted of words, a questioning look on one juror's face along with the shrug of another's shoulders or something else.

"[A] verdict will be set aside only if there appears a substantial likelihood of juror bias." (*People v. Von Villas* (1995) 36 Cal.App.4th 1425, 1431.) Here, the incident was so insignificant in the overall scheme of the trial, that the judge, the prosecutor and defense counsel apparently forgot about it by the next morning because none mentioned it. Even if some jurors did discuss the fact they did not understand what the term meant, such an exchange "judged objectively was not inherently and

substantially likely to have influenced the jur[y]." (*Id.* at p. 1432.) We conclude there was no substantial likelihood of juror bias even if members of the jury did tell each other they did not know what the term meant.

We next turn to the Juror No. 4 incident. In his letter to the judge, Juror No. 4 said he believed defendant "***will never re-offend***." Also included were the words: "Some jurors and some inmates think pedophiles must die" and mention that jurors discussed it might be a quick case.

"'[O]nce a court is put on notice of the possibility that improper or external influences are being brought to bear on a juror, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged *and whether the impartiality of other jurors had been affected.* (Defendant's italics.) [Citation.]'" (*People v. Ramirez* (1990) 50 Cal.3d 1158, 1175.) Accordingly, the court interviewed Juror No. 4.

Juror misconduct """may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party . . . ."""" (*In re Hitchings* (1993) 6 Cal.4th 97, 119.)

In *People v. Jenkins* (2000) 22 Cal.4th 900, the court received two notes about an unidentified juror from the jury foreperson during penalty phase deliberations. After the foreperson was examined at length, "defense counsel concluded the unidentified juror was the sole holdout in favor of a sentence less than death." (*Id.* at pp. 1045-1046, fn. omitted.) The prosecutor argued the unidentified juror should be excused. Defense counsel argued there was no evidence indicating the juror was refusing to obey the law. The judge did not excuse the juror. The jury fixed the penalty at death and defendant argued on appeal the jury's penalty deliberations were tainted by the unidentified juror's inability to deliberate. The court concluded any claim of error was waived on appeal

when defense counsel objected at trial on tactical grounds to an examination of the juror. (*Id.* at p. 1047.)

In the instant case, both court and counsel reached some sort of agreement about the extent of the in-chambers examination of Juror No. 4. Afterwards, the court specifically asked if there was "anything else about other jurors?" We presume there were tactical reasons which caused both lawyers to decline the court's two invitations to suggest something in addition to excusing Juror No. 4. Under these circumstances, we conclude defendant waived any error.

We further conclude the trial court conducted a proper and thorough inquiry of Juror No. 4. During the court's interrogation of the juror, the judge repeatedly inquired whether or not the juror had any discussions about his opinions or about the case with other jurors. Three times the juror responded there had been no discussions, stating: "No," "No, absolutely not," and "Absolutely zero. Nothing."

Despite Juror No. 4's statements that "some jurors and some inmates think pedophiles must die" and that jurors discussed it might be a quick case, there is no indication that the impartiality of any jurors other than Juror No. 4 was deficient. The jury was consistently admonished not to talk about the case. "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) From the totality of the circumstances, we see no indication of any harm to defendant as a result of the content of Juror No. 4's letter to the court.

SVPA

Under the SVPA, a person may be "committed to a secure facility for mental health treatment" if a court or jury finds, beyond a reasonable doubt, that the person is a sexually violent predator. (§§ 6600.05, subdivision (a), 6604.) "'Sexually violent predator' means a person who has been convicted of a sexually violent offense

against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) "'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).) "'Predatory' means an act is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or an individual with whom a relationship has been established or promoted for the primary purpose of victimization." (§ 6600, subd. (e).)

Six months prior to an inmate's scheduled release date, the Director of Corrections makes an initial determination that the inmate, who is either serving a determinate prison sentence or whose parole has been revoked, may be a sexually violent predator and refers the inmate for a psychiatric evaluation by two DMH appointed physicians. (§§ 6601, subds. (a)(1), (d).) The DMH evaluators must agree that the inmate has a diagnosable mental disorder and a high risk of reoffense to permit the district attorney to file a petition. (§ 6601, subds. (d), (h).) If they do not agree, "the Director of Mental Health shall arrange for further examination of the person by two independent professionals." (§ 6601, subd. (e).)

Once a petition is filed under the SVPA, "A judge of the superior court shall review the petition and shall determine whether there is probable cause to believe that the individual named in the petition is likely to engage in sexually violent predatory criminal behavior upon his or her release." (§ 6602, subd. (a).) If the court finds probable cause, a trial is ordered "to determine whether the person is, by reason of a diagnosed mental disorder, a danger to the health and safety of others in that the person is likely to engage in acts of sexual violence upon his or her release." (*Ibid*.) An inmate subject to the SVPA is entitled to a trial, appointed counsel if indigent, the assistance of

retained experts, and access to all relevant medical and psychological records and reports. (§ 6603, subd. (a).) Further, the trier of fact, either a judge or jury, must find by proof beyond a reasonable doubt that the inmate meets the SVPA criteria to warrant a commitment. (§§ 6603, subd. (f), 6604.)

Claimed Instructional error

Defendant next contends the trial court erred in instructing the jury. According to his argument, absent from the court's instruction was an admonition that the jury must determine whether custody in a secure facility is necessary to ensure that defendant is not a danger to the health and safety of others.

The source of the issue is CALJIC No. 4.19. In its definition of a "sexually violent predator," that instruction states an SVP is likely to engage in sexually violent predatory criminal behavior. It states that the word "likely" means a serious and well-founded risk that he or she will commit sexually violent predatory crimes if free in the community.

In *People v. Grassini* (2003) 113 Cal.App.4th 765, the defendant also argued the court erred by failing to instruct the jury to determine whether custody in a secure facility was necessary to ensure that he was not a danger to the health and safety of others. (*Id.* at p. 776.) As in the instant case, the defendant presented evidence about his amenability to voluntary treatment upon release. That court concluded that "at the very least, the presence of [evidence of amenability to voluntary treatment] creates a sua sponte duty in the trial court to instruct the jury that it is to determine whether custody in a secure facility is necessary to ensure that the individual is not a danger to the health and safety of others." (*Id.* at p. 777, fn. omitted.)

Applying the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, the *Grassini* court concluded the jury was adequately informed of the concept and would not have come to a different result if it had been

instructed as the defendant requested. The court concluded the issue was squarely placed before the jury because both sides gave adequate information about the concept in their arguments to the jury. (*People v. Grassini*, *supra*, 113 Cal.App.4th at p. 778.)

The Attorney General agrees the instruction was not given in this case, but contends any error was harmless "because the evidence presented and the arguments of counsel adequately informed the jury of this concept." Malinek told the jury that, "one has to assess whether the inmate is amenable to treatment on an outpatient basis in lieu of commitment to a state hospital and will follow up and could be reliably treated on an outpatient basis as different from committed to a psychiatric hospital." Malinek did not have confidence in defendant's ability to rehabilitate himself: "I don't think that he wanted to offend all those years. I think he got into a — some type of a state or a phase or a feeling where he pretty much lost it and went with the deviant urge and forgot everything that he learned elsewhere and could not — where the urge was overriding anything else in him."

Psychologist Mark Schwartz described a time defendant molested a child while he was on probation. Schwartz testified, "one would assume when you're under supervision you would be constantly reminded of what you shouldn't do, and for you to do it in that period of time, again, leads me to how strong these urges are." When specifically asked whether or not defendant was amenable to voluntary treatment, Schwartz said, "I don't think that would lower his serious risk, his substantial danger —"

Based on the evidence, we conclude there is no reasonable probability that the jury would have arrived at a result more favorable to defendant had the language at issue been included in the instruction. Any error was harmless beyond a reasonable doubt.

Separate finding of inability to control behavior

Defendant's last argument is that the act is unconstitutional because it does not require a separate finding of inability to control behavior. Defendant claims a

separate instruction on control was constitutionally necessary under *Kansas v. Crane* (2002) 534 U.S. 407.

This argument was rejected by the California Supreme Court in *People v. Williams, supra,* 31 Cal.4th 757. The court said the language of the SVPA "inherently encompasses and conveys to a fact finder the requirement of a mental disorder that causes serious difficulty in controlling one's criminal sexual behavior." (*Id.* at p. 759.) Under *Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d 450, we are required to follow precedent.

Moreover, just as the *Williams* court noted, we note that "no rational jury could have failed to find he harbored a mental disorder that made it seriously difficult for him to control his violent sexual impulses. Hence, the absence of a 'control' instruction was harmless beyond a reasonable doubt." (*People v. Williams, supra,* 31 Cal.4th at p. 760.)

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

O'LEARY, J.